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7 Attorneys for Debtor,
DEMEX ENGINEERING, INC.

9 UNITED STATES BANKRUPTCY COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 In Re:
13 DEMEX ENGINEERING, INC.
14 Debtor.

Case No. 08-31873
Chapter 11
[No Hearing Date Scheduled]

17 MOTION OF DEBTOR AND FINANCIAL FEDERAL CREDIT, INC. FOR ORDER
18 APPROVING STIPULATION FOR ENTRY OF INTERIM ORDER PURSUANT TO 11 U.S.C. §§
105 AND 361, 362, 363, 503 AND 507, AND BANKRUPTCY RULES 4001 AND 9014: (I)
19 AUTHORIZING DEBTOR TO USE CASH COLLATERAL; (II) MODIFYING THE
20 AUTOMATIC STAY; (III) GRANTING POST-PETITION LIENS; AND, (IV) GRANTING
ADEQUATE PROTECTION

21 Demex Engineering, Inc., Debtor and Debtor in Possession ("Debtor") and Creditor Financial
22 Federal Credit Inc. ("FFCI") hereby move the Court for entry of an interim order pursuant to 11
23 U.S.C. §§105, and 361, 362, 363,503, and 507 and Bankruptcy Rules 4001 and 9014 of the Federal
24 Rules of Bankruptcy Procedure and Local Bankruptcy Rule 9014-1(b) authorizing Debtor to use
25 cash collateral; modifying the automatic stay; granting post-petition liens; and, granting adequate
26 protection. In further support of the Motion, the Debtor and FFCI respectfully represent as follows:

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STATEMENT OF RELIEF REQUESTED

1. The Debtor seeks an interim order authorizing its use of cash collateral of FFCI.

2. On October 3, 2008, the Debtor filed a voluntary petition for relief with this Court under Chapter 11 of the Bankruptcy Code.

3. On November 12, 2008, the Debtor and FFCI filed a Motion to authorize the Debtor to use the cash collateral of FFCI ("Initial Motion"), which is incorporated by reference hereto.

4. On December 18, 2009, the Court entered an interim order authorizing the Debtor to use the cash collateral of FFCI; this authorization expired on March 15, 2009.

5. On March 13, 2009, the Debtor filed with the Court a Stipulation by and between Debtor and Financial Federal Credit Inc. to Interim Order Pursuant to 11 U.S.C. §§105, and 361, 362, 363, 503, and 507 and Bankruptcy Rule 4001: (I) Authorizing Debtor to Use Cash Collateral; (II) Modifying the Automatic Stay; and (III) Granting Post-Petition Liens and (IV) Granting Adequate Protection extending the term of the Initial Stipulation (the "Renewed Stipulation").

6. No party filed an objection to the proposed Stipulation; however, inadvertently Debtor's Counsel did not upload an order for the Court's signature.

7. Debtor has fully complied with the terms and conditions of the Initial Stipulation and the Renewed Stipulation and is current on all of its post-petition obligations.

8. The Debtor seeks to continue to use FFCI's cash collateral and grant replacement liens and other relief as set forth below.

FACTS

6. The Debtor is continuing in possession of its property and managing its business as a debtor in possession pursuant to Bankruptcy Code §§ 1107 and 1108;

7. On or about August 10, 2007, FFCI entered into a Lease Agreement ("Lease") with the Debtor whereby FFCI leased a Terex Wheel Loader, Model TXL250-2 ("Wheel Loader") to the Debtor. Pursuant to the terms of the Lease, the Debtor was to make 59 monthly lease payments of \$3,275.00 plus tax. A true and correct copy of the Lease Agreement was attached to the Initial Motion as Exhibit 1.

1 8. In connection with entering into the Lease, the Debtor also granted FFCI a security
2 interest in all of its personal property assets described as all goods, inventory, equipment, accounts,
3 accounts receivable, documents, instruments, chattel paper, contract rights, general intangibles,
4 investment property, security entitlements, deposit accounts, fixtures, and all other property then
5 owned or thereafter acquired by the Debtor together with all books and records relating thereto and
6 all proceeds therefrom ("Collateral"). FFCI first perfected its lien on the Collateral by filing its
7 UCC-1 financing Statement with the Secretary of State on August 6, 2007, recorded as Instrument
8 No. 07-7124820930. A true and correct copy of the UCC-1 Financing Statement was attached to the
9 Initial Motion as Exhibit 2.

10 9. In addition to the Lease, on October 24, 2007, the Debtor obtained a loan from FFCI
11 evidenced by a Promissory Note in the sum of \$29,088.00. Pursuant to the terms of the Promissory
12 Note, the Debtor was to make monthly installments of \$1,212.00 until the loan was paid in full. A
13 true and correct copy of the Promissory Note was attached to the Initial Motion as Exhibit 3.

14 10. In consideration for making the loan to the Debtor, FFCI was granted a security
15 interest in two Airmen Air Compressors, Model Nos. 185CFM ("Compressors"). A true and correct
16 copy of the Security Agreement evidencing the security interest in the Compressors was attached to
17 the Initial Motion as Exhibit 4.

18 11. The Debtor failed to make all of the monthly payments due on both the Wheel Loader
19 and the Compressors. The Debtor turned over possession of the Wheel Loader to FFCI and FFCI
20 caused the Wheel Loader to be sold by public sale in a commercially reasonable manner for the net
21 sum of \$79,110.40. Applying the proceeds from the sale to the amount due on the Lease the balance
22 due as of October 6, 2008 was \$86,680.17 with interest accruing at the per diem rate of \$42.97 per
23 day plus attorneys' fees and costs.

24 12. The Debtor also failed to make all of the monthly payments due FFCI on the loan
25 secured by the Compressors and the amount due on the loan which, as of November, 2008, was
26 \$20,041.13 plus accruing interest thereon and attorney's fees and costs. The Debtor needs the
27 Compressors for its effective reorganization.

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1 13. As a result of the grant of the lien on the Collateral, FFCI has a lien on “cash
2 collateral” as that term is defined in U.S.C. § 363. FFCI will allow the Debtor to continue to use
3 cash collateral on the terms and conditions set forth in a Stipulation by and between Debtor and
4 Financial Federal Credit Inc. to Interim Order Pursuant to 11 U.S.C. §§105, and 361, 362, 363,503,
5 and 507 and Bankruptcy Rule 4001: (I) Authorizing Debtor to Use Cash Collateral; (II) Modifying
6 the Automatic Stay; and (III) Granting Post-Petition Liens and (IV) Granting Adequate Protection
7 (“Stipulation”), attached hereto as Exhibit A.

8 **IMPORTANT TERMS OF THE STIPULATION**

9 14. The Debtor proposes to continue to adequately protect FFCI by providing a
10 replacement lien on post-petition accounts receivable and on the same assets that FFCI was granted a
11 security interest in pre-petition. In addition, the Debtor proposes to continue to make monthly
12 payments on both the Lease and the Note in the sum of \$6,840.21. Payments shall continue to be
13 due on the first of each month. The Stipulation shall remain in effect through the earliest of
14 September 30, 2009, the occurrence of an event of default under the Stipulation, or the date the
15 Stipulation ceases to be in full force and effect for any reason.

16 15. The Stipulation provides for a superpriority expense of administration to the extent
17 the replacement liens and security interests granted to FFCI are insufficient to compensate FFCI for
18 the use of its cash collateral.

19 16. Pursuant to the term of the Stipulation, the Debtor may not be able to recover upon
20 any claim under 11 U.S.C. §§ 506(c), 552(b) or any other applicable law against any of FFCI’s
21 collateral by way of a surcharge or for costs and expenses arising out of or appertaining to the
22 Debtor’s bankruptcy.

23 17. The Debtor agrees that the Lease, Promissory Note and Security Agreement are valid
24 and enforceable documents. The Debtor also cannot use FFCI’s cash collateral to object, contest,
25 raise any defenses to the validity, perfection, priority, extent or enforceability of the sums due to
26 FFCI; to assert any action for preferences, fraudulent conveyances or other avoidance power claims
27 or claims, counterclaims or causes of action against FFCI; to pay any monies compensation or
28 otherwise to insiders of the Debtor except as set forth in the Debtor’s budget attached to the

1 Stipulation; or to pay any amount on account of any claim arising prior to the petition date, unless
2 such payments on accounts of pre-petition claims are approved by the Stipulation or consistent with
3 the budget attached to the Stipulation.

4 18. In the event of a default in payments or performance under the terms of the
5 Stipulation, the Lease, Promissory Note and Security Agreement, FFCI may terminate use of cash
6 collateral and would obtain relief from the automatic stay to take possession of and liquidate the
7 Compressors and its Collateral.

8 **LAW SUPPORTING THE ENTRY OF AN ORDER ON THE STIPULATION**

9 19. The Debtor's use of property of the estate is governed by § 363 of the Bankruptcy
10 Code. Section 363(c)(1) provides, in pertinent part, that:

11 If the business of the debtor is authorized to be operated under
12 Section...1108...of this title and unless the court orders otherwise,
13 the trustee [or debtor-in-possession] may enter into transactions,
including the sale or lease of property of the estate, in the ordinary
course of business without notice or hearing.

14 20. The Bankruptcy Code establishes a special requirement, however, regarding the use
15 of "cash collateral". Bankruptcy Code § 363(c)(2) permits the debtor in possession to use, sell or
16 lease cash collateral under subsection (c)(1) only if either of two alternative circumstances exists:

17 (A) each entity that has an interest in such cash collateral consents; or

18 (B) the court, after notice and a hearing, authorizes such use sale or
19 Lease in accordance with the provisions of this section.

20 21. If the entities with an interest in cash collateral – here FFCI – does not consent to the
21 use of its cash collateral, the Bankruptcy Court can authorize the debtor in possession to use said
22 cash collateral under Bankruptcy Code § 363(c)(2)(B) if the Court determines that the debtor has
23 provided "adequate protection" of the secured creditor's interest in the cash collateral.

24 22. Section 361 of the Bankruptcy Code provides that:

25 When adequate protection is required...of an interest of an entity
26 in property, such adequate protection may be provided by –

27 (1) requiring the trustee to make a cash payment or periodic
28 cash payment to such entity, to the extent that the...use...under
section 363 of this title...results in a decrease in the value of such
entity's interest in such property;

1 (2) providing to such entity an additional or replacement
2 lien to the extent that such...use...results in a decrease in the value
of such entity's interest in such property; or

3 (3) granting such other relief...as will result in the
4 realization by such entity of the indubitable equivalent in such
entity's interest in such property

5 23. Neither § 361 nor any other provision of the Bankruptcy Code defines the nature and
6 extent of the "interest in property of which a secured creditor is entitled to adequate protection under
7 § 361. However, the statute plainly provides that a qualifying interest demands protection only to
8 the extent that the use of the creditor's collateral will result in a decrease in "the value of such
9 entity's interest in such property." 11 U.S.C. §§ 361, 363(e). See also: General Electric Mortgage
10 Corp. v. South Village, Inc. (In re South Village, Inc.), 25 B.R. 987, 989-90 & n4 ((Bankr. D. Utha
11 1982); O'Toole, Adequate Protection and Postpetition Interest in Chapter 11 Proceedings, 56 Am.
12 Bankr. L.J. 251, 263 (1982).

13 24. The phrase "value of such entity's interest", although not define in the Bankruptcy
14 Code, was addressed by the Supreme Court in the landmark Timbers decision, United Savings
15 Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 108 S. Ct. 626
16 (1988). For the meaning of "value of such entity's interest", the Supreme Court was guided by
17 § 506(a), which defines a creditor's allowed secured claim:

18 "The phrase 'value of such creditor's interest' in § 506(a) means "the
19 value of the collateral.' H.R. Rep. No. 950-595, pp. 181, 356 (1977);
20 see also S. Rep. No. 95-989, p. 68 (1978) U.S. Code Cong. & Admin.
21 News, 1978 pp. 5787, 6141, 6312. We think the phrase 'value of such
entity's interest' in § 361(1) and (2), when applied to secured creditors,
means the same."

22 Id. at 630 (emphasis added).

23 25. Thus, Timbers provides that a secured creditor is entitled to "adequate protection"
24 only against diminution in the value of the collateral securing the creditor's allowed secured claim.
25 Under Timbers, therefore, where the "value of the collateral" is no diminishing by its use, sale or
26 lease, the creditor's interest is adequately protected. This conclusion flows directly from the
27 equivalency of "value of such entity's interest" with "value of the collateral".

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1 26. The Debtor and FFCI jointly agree that pursuant to the terms and conditions set forth
2 in the Stipulation, FFCI is adequately protected by the payments and the replacement liens and other
3 relief and will consent to the use of its cash collateral on those terms. Prior to September 30, 2009,
4 the date when the use of cash collateral terminates, the parties will either agree on a stipulation for
5 further use of cash collateral or the Debtor shall file a motion to use cash collateral if there is no such
6 agreement and, in such event, FFCI shall have the opportunity to object.

7 27. This motion is being made by the Debtor and FFCI pursuant to the procedures set
8 forth in Local Bankruptcy Rule 9014-1(b)(3). All parties shall have an opportunity to object to the
9 relief set forth in the Stipulation and request a hearing on this matter. Any such hearing must be
10 filed and served upon the Debtor and FFCI within 20 days of mailing of the notice. If no timely
11 objection to the requested relief or request for hearing is made, the Court may then enter the order
12 granting the relief by default.

13 WHEREFORE, the Debtor and FFCI pray for an Order from this Court approving the
14 Stipulation submitted to the Court and for such other and further relief as the Court deems just and
15 proper.

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17 DATED: June 18, 2009

NEVIN, RAMOS & STEELE

18
19 By: /s/ Alan E. Ramos
ALAN E. RAMOS,
20 Attorneys for Demex Engineering, Inc.

21
22 DATED: June 18, 2009

FRANDZEL ROBINS BLOOM & CSATO, L.C.

23
24 By: /s/ Andrew K. Alper
ANDREW K. ALPER
25 Attorneys for Creditor, FINANCIAL FEDERAL
26 CREDIT INC.